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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

E. D. SHELLEDY, Petitioner

v.

EDWARD LORE, et al., Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

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QUESTIONS PRESENTED

Whether standing doctrine may be utilized to deprive the federal government's grantee of title by allowing limitations period to run while the title was in the federal government.

Whether Utah may infringe upon the federal government's power to manage and dispose of its property by denying the federal government's grantee standing to establish his chain of title.

Whether a tax deed which is void for lack of jurisdiction over the property by the taxing authority may be the basis of good title by operation of a short statute of limitations.

LIST OF PARTIES

The parties to the proceedings below were the petitioner E.D. Shelledy and the respondents Edward Lore, Alan Parsons, Erin Parsons, Roy Hockin, Harry Deckered, Kent C. Bangerter, Lloyd V. McBride, David C. Kunz, and Susan S. Kunz, individuals, Merit Distributing, Inc., a Utah corporation, State Tax Commission of the State of Utah, and Salt Lake County.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

E. D. SHELLEDY, Petitioner

v.

EDWARD LORE, et al., Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

The petitioner E.D. Shelledy respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Utah, entered in the above-entitled proceeding on April 14, 1992, and from which a timely Petition for Rehearing was denied on July 21, 1992.

OPINIONS BELOW

The opinion of the Utah Supreme Court is not yet reported in the Pacific Reporter, but was reported informally at 184 Utah Advance Reports 45 (April 21,

1992), and is reprinted in the Appendix hereto, p.A1, infra. The Order denying the timely petition for rehearing is reprinted in the Appendix hereto, p.C1, infra. The Order of the trial court of the Third District Court in and for Salt Lake County, State of Utah (Sawaya, District Judge) was not reported. It is reprinted in the Appendix hereto, p. B1, infra.

JURISDICTION

The judgment of the Supreme Court of the State of Utah was entered on April 14, 1992, affirming the decision of the lower court dated January 17, 1990. The Utah Supreme Court denied a timely petition for rehearing on July 21, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

STATUTES INVOLVED

Utah Code Ann. §78-12-5.2 provides in pertinent part:

Holder of tax title--Limitations of action or defense -- Proviso.

No action or defense for the recovery or possession of real property or to quiet title or determine the ownership thereof shall be commenced or interposed against the holder of a tax title after the expiration of four years from the date of the sale, conveyance or transfer of such tax title to any county, or directly to any other purchaser thereof at any public or private tax sale and after the expiration of one year from the date of this act.

Utah Code Ann. §78-12-5.3 provides in pertinent part:

Definitions of "tax title" and "action."

(1) the term "tax title" as used

in §78-12-5.1 and §59-2-1364, and the related amended §§78-12-5, 78-12-7, and 78-12-12, means any title to real property, whether valid or not, which has been derived through or is dependent upon any sale, conveyance, or transfer of property in the course of a statutory proceeding for the liquidation of any tax levied against the property whereby the property is relieved from a tax lien.

STATEMENT OF THE CASE

This case involves the question of title to certain real property located in Salt Lake County, Utah. Petitioner claims title as grantee of the Small Business Administration (hereinafter "SBA"), an agency of, and entitled to the full sovereign immunity of, the United States. R.25; 16-19; 71-73.

On January 14, 1981, the SBA acquired record title to the real property in dispute. R.72. At that time, Salt Lake County claimed a lien against the property for unpaid ad valorem taxes. R.72.

Salt Lake County continued to assess taxes on the property and on May 23, 1984, Salt Lake County purported to convey the property by tax deed to Edward Lore at a final May tax sale, while the SBA was still record title holder of the property. The final May tax sale is the culminating step in Utah's statutory scheme of tax lien foreclosure, and is the time when record title is taken from the property owner and granted to the tax purchaser or the county by a tax deed. Edward Lore then purported to convey the property to various other respondents. R.3-4, 17-18, 72-73, 87.

On December 28, 1988, the SBA conveyed all its right, title and interest to the

property to the petitioner, E.D. Shelledy. R.5, 19, 73.

On March 3, 1989, petitioner, as grantee of the SBA, filed suit to quiet title to the property, claiming the 1984 tax deed was void because of the sovereign immunity of the United States, and sought a refund of tax monies he had paid under protest which were assessed against the property by Salt Lake County while the SBA held title to the property. R.2-8, 20-21.

On January 17, 1990, the trial court, ruling on cross-motions for summary judgment by petitioner and Salt Lake County, entered an order granting Salt Lake County's motion and denying petitioner's motion on all issues, quieting title to the property in the tax sale purchaser's successors-in-interest and awarding petitioner a lien on the property for the taxes paid under protest. R.131-132. See, trial court's Order, Appendix p.B1.

On appeal to the Utah Supreme Court, petitioner claimed error in the trial court and asserted ownership of the property as the SBA's grantee. Respondents sought affirmance of the trial court's ruling.

The Utah Supreme Court reversed the trial court in part, holding that the SBA did not simply purchase a right of redemption, as the trial court had ruled, but was the legal title holder to the property at the time of the May, 1984 final tax sale. See, Utah Supreme Court opinion, Appendix pp. A8-A10. However, the Utah Supreme Court further declared that petitioner lacked standing to assert the immunity of the SBA under the theory that he could not raise the constitutional rights of a third party, and that he was therefore barred from attacking the validity of the 1984 tax deed by the short limitations statute of Utah Code Ann. §78-12-5.2 (1953 as amended). This conclusion

was reached in spite of the fact that such limitations period could only have run during the time the SBA held title to the property and prior to its conveyance to Petitioner. See, Utah Supreme Court opinion, Appendix pp. A1-A21.

Thus, federal question jurisdiction and the issues sought to be reviewed have been presented at both the trial and appellate levels in the state courts. Petitioner claimed title to property as grantee of the United States (SBA) as against those claiming under the tax deed petitioner contended was void under the doctrine of sovereign immunity. All issues necessarily arose, in both the trial and appellate courts, out of this basic contention. The Utah trial and appellate courts rejected petitioner's claim to title from the United States and denied the sovereign immunity and related claims.

REASONS FOR GRANTING THE WRIT

The Utah Supreme Court's decision in this case directly impairs the federal government's ability to manage and dispose of its property. The decision conflicts, both directly and in principle, with decisions of this Court on issues which have been well settled for decades, and also conflicts with decisions of the highest courts of other states. The decision further represents a gross and unwarranted use of standing doctrine which, if accepted, creates an unlawful loss of federal property, and opens the door to burdening the federal government in the future with enormous costs and potential losses in the management of its property interests.

I.

THE UTAH SUPREME COURT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND DECISIONS OF THE HIGHEST COURTS OF OTHER STATES.

A. CONFLICT WITH UNITED STATES SUPREME COURT DECISIONS

The Utah Supreme Court's opinion holds that Utah's four-year short statute of limitations, Utah Code Ann. §78-12-5.2 (1953 as amended), bars petitioner's attack on the 1984 tax sale and deed, notwithstanding that the limitations period could only have run during that time which the property was owned by the SBA. The Utah Supreme Court's holding is in direct and irreconcilable conflict with the United States Supreme Court's decision in Gibson v. Chouteau, 13 Wall. [80 U.S.] 92, 20 L.ed. 534 (1871), which, along with other decisions of this Court, established the now well-settled doctrine that state

limitations periods do not run against the federal government or its grantees. The state court in Gibson had held that a limitations period under state adverse possession statutes had cut off the government grantee's rights prior to the grantee receiving legal title to the property from the United States. The state court concluded under a theory of relation that the legal title related back to an earlier date when the grantee may have had a equitable interest in the property and that the limitations period ran during this time of equitable interest prior to conveyance of the legal title by the federal government. This Court reversed, holding that the power of Congress to manage and dispose of federal property is subject to no limitation and that no State legislation may interfere with Congress' right therein nor embarrass its exercise. Gibson v. Chouteau, 13 Wall. [80 U.S.] at 99.

The Gibson Court further addressed the protection afforded the government's grantee:

> The same principle which forbids any State legislation interfering with the power of Congress to dispose of the public property of the United States, also forbids any legislation depriving the grantees of the United States of the possession and enjoyment of the property granted ... . The consummation of the title is not a matter which the grantees can control, but one which rests entirely with the government. With the legal title, when transferred, goes the right to possess and enjoy the land, and it would amount to a denial of the power of disposal in Congress if these benefits, which should

> follow upon the acquisition of that title, could be forfeited because they were not asserted before that title was issued.

Gibson v. Chouteau, 13 Wall. [80 U.S.] at 100 [emphasis added].

Thus, Gibson and other cases have long established that no limitations period may run against the government's grantee except that which may begin and fully run its course after the government conveys legal title to the property to the grantee. Simmons v. Ogle, 105 U.S. 271, 26 L.ed. 1087 (1881) (neither limitations nor equitable doctrine of laches could begin to have effect against anyone until legal title conveyed to purchaser of United States); Oaksmith v. Johnston, 92 U.S. 343, 23 L.ed. 682 (1875) (similar).

Just as the doctrine of relation could not defeat the federal government's rights of disposing of its property in Gibson,

standing arguments cannot do so in this case. Only the express consent of Congress may do so, and none has been cited by any party hereto. The practical result of the Utah Court's holding is that although the limitations period concededly could not run against the SBA, it was, during the period of SBA ownership, running against all prospective purchasers of the property. This conclusion of the Utah Court is unsupported by any legal authority and effectively deprives the federal government of the ability to convey title, which it admittedly has, to its chosen grantee. This clearly abridges the power of Congress to dispose of its federal property without any consent from Congress to do so.

The Utah ruling also conflicts in principle with this Court's holding in United States v. Alabama, 313 U.S. 274, 61 S.Ct. 1011, 85 L.ed. 1327 (1940). In Alabama, it was held that although a local

tax lien was valid, once the property became owned by the United States, the taxing authority was without jurisdiction over the property to foreclose its tax lien and the tax deeds issued were void.

The Utah Supreme Court acknowledges that this case is factually within the ambit of the Alabama decision as of the date of the May, 1984 tax sale. Nevertheless, the Utah Court erroneously concluded that Alabama is not determinative because the SBA did not itself bring the present action. This misstates the law as to the legal effects of, and any need for affirmative responses to, an act which is void, as opposed to merely voidable. See, Point III, infra. The Utah Court states that petitioner lacks standing to attack the 1984 tax deed, and that even though the tax deed was void at the time of the tax sale, once petitioner purchased the property from the SBA, the tax deed was

somehow resurrected and placed beyond attack by a limitations statute which could only have run during the time of the SBA's ownership of the property. Neither authority nor analysis is offered by the Utah Court for this feat of legal legerdemain. The doctrine of standing is simply invoked and a result declared.

The effect of the Utah ruling is to eviscerate the authority of the Alabama decision, as it implies that the rule under Alabama cannot benefit the federal government's grantees and renders any property in like circumstances valueless to the federal government unless the government itself brings judicial action to remove the cloud on its title created by the void acts of a taxing authority which lacked jurisdiction over the property. Congress has not consented to the imposition of such a burden on the federal government, and petitioner asserts that,

absent such consent, the State of Utah may not reach such a result.

B. CONFLICT WITH OTHER STATE COURTS' DECISIONS

The Utah Supreme Court's decision also is in conflict, directly and in principle, with decisions of the highest courts of other states. On facts virtually identical to those here, the Florida Supreme Court in Daniell v. Sherrill, 48 So.2d 736 (Fla.1950) held that any purchaser of property from the United States could raise the immunity issue to contest the validity of tax deeds issued on property owned by the United States. Id. at 739. This determination conforms to the generally accepted rule that a litigant may challenge the validity of a tax deed if he or those under whom he claims had title or other cognizable interest in the property at the time of the tax sale. Preston v. Iron County, 105 Wis. 2d 346, 314 N.W.2d 131

(1981) (vendee under unrecorded land contract had standing to challenge tax deeds); Hopper v. Chandler, 183 Ark. 469, 36 S. W.2d 398 (1931) (those under whom litigant holds must have had interest at time of tax sale in order to challenge it); Smith v. Whitney, 105 Mont. 523, 74 P.2d 450 (1937) (similar); Gee v. Bullock, 349 Mo. 1154, 164 S.W.2d 281 (1942) (similar); Morcom v. Brunner, 30 Wash.App. 532, 635 P.2d 778 (Wash. App. 1981) (privity with predecessor in title gives successor same rights to challenge tax title that predecessor had).

In these cited cases, when grantees acquired title to property by conveyance, they were allowed to challenge clouds to their title which arose during the time of ownership of their grantor. To hold, as the Utah Supreme Court has done, that a grantee lacks standing to assert claims of a grantor who has conveyed all its right,

title and interest to the grantee eviscerates concepts of privity which are at the foundations of property rights developed from the earliest days of the English common law and adopted in our Constitution.

II.

THE UTAH COURT'S DENIAL OF STANDING OF PETITIONER IS ERROR AND BEYOND ANY PERMISSIBLE INTERPRETATION OF STANDING DOCTRINE

A. NO STANDING ISSUE EXISTS UNDER THE FACTS OF THIS CASE.

Standing is not a valid issue in this case. Petitioner seeks merely to establish his chain of title to the property in dispute by a quiet title action. The fact that his predecessor in interest was the SBA is a historical and irrefutable fact of petitioner's chain of title, and the legal effects of the SBA's period of ownership cannot be ignored or denied under some ill-

conceived standing argument.

Standing doctrine arises out of concepts of justiciability under the cases and controversies section of the Federal Constitution. The essence of standing doctrine is whether the litigant has a personal stake in the issue presented. Warth v. Seldin, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed. 2d 343 (1975). Petitioner paid valuable consideration to the SBA to acquire title to the disputed property. His claim to that title is at stake. In an action to quiet title, it is difficult to imagine anyone with a more personal stake in the issue presented than a purchaser of the property. Moreover, as indicated above, the generally accepted rule is that a grantee's privity with his grantor supplies the basis for standing to raise claims against a tax deed or sale made during the grantor's ownership of the property. Daniel v. Sherrill, 48 So.2d 736

(Fla. 1950); Gee v. Bullock, 349 Mo. 1154; 164 S.W.2d 281 (1942); Preston v. Iron County, 105 Wis.2d 3436, 314 N.W.2d 131 (1981); Hopper v. Chandler, 183 Ark. 469, 36 S.W.2d 398 (1931), Smith v. Whitney, 105 Mont. 523, 74 P.2d 450 (1937).

In holding that petitioner lacked standing, the Utah Supreme Court reasoned that petitioner is attempting to assert for himself the constitutional rights of a third party (the SBA). Petitioner believes the bar to asserting third-party rights is simply not applicable under the facts of this case. Petitioner does not claim any sovereign immunity for himself because of his relationship with the federal government, as was the case in Northside Canal Co. v. State Board of Equalization, 8 F.2d 739 (D.C. Wyo. 1925). He merely is stating a material fact in his chain of title, that of the ownership of the property by the SBA at the time of the

purported tax sale, and the legal effect of that fact.

B. KEMMERER COAL CASE IS FLAWED AND CANNOT BE CONTROLLING HERE.

In reaching its decision, the Utah Supreme Court relies on the case of Kemmerer Coal Co. v. BYU, 723 F.2d 54 (10th Cir. 1983), in which the Tenth Circuit panel purported to apply Utah law to a tax deed challenge. In Kemmerer, the Tenth Circuit was presented with a claim of invalidity of a tax deed brought more than twenty years after the issuance of the tax deed and more than thirty years after the assessments which were claimed to violate due process by the plaintiffs, successors-in-interest to the titleholders at the time of the tax proceedings. The Tenth Circuit panel faced the difficult issue of whether it is constitutionally permissible for a limitations statute to bar claims based on alleged violations of federal due process

rights. The panel avoided this issue by holding that the plaintiff lacked standing to assert the rights of its predecessor-in-interest and that "under the facts of this case...we do not believe it fundamentally unfair to apply the statute of limitations to Kemmerer... ." Id. at 57-58. Thus, by using a standing doctrine argument, the Tenth Circuit in effect decided, without expressly saying so, that under the unusual facts of Kemmerer, it was constitutionally permissible to cut off a due process claim.

The Utah Court has failed to address the impact of the factual distinctions between this case and Kemmerer, primarily that of the ownership of the property by the federal government (Kemmerer involved only private parties), and the absence in this case of any time period during which a limitations period could run (the SBA owned the property until December, 1988).

The Kemmerer court was viewing a fact situation in which the taxing authority could pass good title if all statutory steps were followed. See, Hansen v. Morris, 3 Utah 2d 310, 315, 283 P.2d 884, 887 (1955) and discussion in Point III, infra. In this case, under the authority of the United States v. Alabama decision, the taxing authority lacked jurisdiction over the property because of the ownership of the SBA and therefore could not pass good title even if all statutory steps were followed. And since no limitations could run against the SBA, limitations could not cut off petitioner's claim in the three months between his acquisition of title from the SBA and the filing of the quiet title action.

As seen above, and below in sub-point C, use of standing doctrine to bar claims of parties in privity with their predecessors in interest is an extreme

minority viewpoint. Such a use of standing doctrine runs counter to centuries-old principles of privity which underlie our concepts of property rights and is fundamentally flawed when applied to the facts of this case. It may not be used to impair the federal government's rights in disposing of its property or the government grantee's rights to receive title to that property.

C. PETITIONER FALLS WITHIN THE JUS TERTII EXCEPTIONS TO THIRD-PARTY STANDING DOCTRINE.

Even if third-party standing issues are addressed, the Utah Supreme Court's conclusion that petitioner does not fall within the so-called jus tertii exceptions to the rule is simply erroneous.

One or more of the following three factors are generally present when this Court allows a party to assert the constitutional rights of a third party:

"first, the presence of some substantial relationship between the claimant and the third parties; second, the impossibility of the rightholders asserting their own constitutional rights; and third, the need to avoid a dilution of third parties' constitutional rights that would result were the assertion of jus tertii not permitted." Note, Standing to Assert Constitutional Jus Tertii, 88 Harv. L.Rev. 423, 425 (1975).

The Utah Supreme Court's opinion cavalierly pronounces that "[n]one of the above are present in the instant case." Appendix, p.A15. This conclusion is plain error. An examination of the facts reveals that each factor is present in this case and supports petitioner's standing to challenge the tax deed.

1. Presence of Substantial Relationship.

There is the requisite "substantial relationship" between petitioner and the SBA to satisfy the first jus tertii factor. Petitioner paid valuable consideration to the SBA to acquire all its right, title and interest in the property and the SBA assumed it conveyed all its interest to petitioner. A more substantial relationship can hardly be imagined. A large sub-class of "special relationship" jus tertii cases involve vendor-vendee status, e.g., Barrows v. Jackson, 346 U.S. 249 (1953); Craig v. Boren, 429 U.S. 190 (1976); Eisenstadt v. Baird, 405 U.S. 438 (1972). It has been suggested that such cases are actually first party rights cases seeking to protect the litigant against economic injury resulting from unjustified discrimination against those with whom he sought to interact. Standing was granted in each case. Monaghan, Third Party Standing, 84 Colum. L.Rev. 277 (1984) at

282,297, 299. It should be noted that these "first-party rights" cases involved anticipated economic relations, whereas the instant case involves an existing, accomplished economic relation--the petitioner has purchased the property from the SBA. Thus, petitioner's relationship is even more substantial than others which have been held to fall within the jus tertii exception.

2. Impossibility of SBA to Assert Its Rights.

It is impossible for the SBA to assert its own constitutional rights to manage and dispose of its property.

The SBA conveyed all its right, title and interest in the property to petitioner and it is likely the SBA itself lacks standing to be a party to this quiet title action, thus leaving its grantee, the petitioner, as the only one able to assert its rights to alienate its property.

3. SBA's Rights Diluted.

If assertion of jus tertii were not permitted here, the SBA's rights would be diluted. The Utah court's ruling either renders the SBA's property valueless to its grantees, or burdens the government with the need to litigate the title prior to conveying the property. Congress has not consented to the imposition of such a burden.

III.

A TAX DEED WHICH IS VOID FOR LACK OF JURISDICTION CANNOT SERVE AS ROOT OF GOOD TITLE TO DEPRIVE THE GOVERNMENT'S GRANTEE OF TITLE

Under the holding of United States v. Alabama, 313 U.S. 274, 61 S.Ct. 1011, 85 L.Ed. 1327 (1940), the 1984 tax deed from Salt Lake County was void because the county lacked jurisdiction over the property to foreclose their lien.

Although Utah Code Ann. §78-12-5.3 defined a tax title as meaning "any title to real property, whether valid or not," and Section 78-12-5.2 barred actions against a tax title after four years from the date of the tax sale, the Utah Supreme Court has in previous cases acknowledged that the language of these statutes is not without limitation. It has recognized that, despite its broad language, certain applications might be beyond the limits of statutory intent or constitutional permissibility. See, Frederiksen v. Lafleur, 632 P.2d 827, 831 n.14 (Utah 1981). The Utah Supreme Court has stated that the statutes only applied where such tax deeds were "executed by the same authority that could have passed good title if each and every statutory step in perfecting a tax title had been followed, without the aid of a limitations statute." Hansen v. Morris, 3 Utah 2d 310, 315, 283

P.2d 884, 887 (1955).

It is well-settled property law that a void deed is a nullity, having no legal effect and invalid in law for any purpose whatsoever. This contrasts with a deed which is merely voidable, requiring an affirmative act to set it aside. A void deed may be attacked collaterally by anyone whose interest is adversely affected by it. Argyle v. Slemaker, 99 Idaho 544, 585 P.2d 954 (1978); Gulf Land & Development Co. v. McRaney, 197 So.2d 212 (Miss. 1967); see generally, 23 AmJur2d Deeds §188 (1978), 26 CJS Deeds §69 (1956). Where the taxing authority lacks jurisdiction to foreclose its tax lien because of ownership by the federal government, the void deed cannot be root of any title which may spring forth after the passage of time. Support, Redfield v. Parks, 132 U.S. 239, 33 L.ed. 327 (1889) (deed void on its face could not support limitations claim under adverse

possession); Brooks v. Marbury, 11 Wheat. [24 U.S.] 78, 87-88, 6 L.Ed. 423, 426 (1826) (uncontroverted that deeds which are absolutely void cannot be the foundation of title); Baxter v. Utah Department of Transportation, 783 P.2d 1045 (Ut. App. 1989); see also, P. Lear, Utah's Short Statutes of Limitations for Tax Titles: The Continuing Specter of Lyman v. National Mortgage Bond Corp.--A Need for Remedial Legislation, 76 BYU L.Rev. 457, 467 (1976) (limitations do not run in favor of a deed which is void because of a jurisdictional defect).

Thus, where, as here, a tax deed is void because the county lacked jurisdiction over the property to enforce its tax lien (and, thus, could not have passed good title if statutory steps were followed), the limitations statute cannot apply to "resurrect" good title. The Utah Supreme Court erred in reaching such a result.

IV.

THE UTAH COURT'S DECISION PLACES AN IMPERMISSIBLE BURDEN ON THE FEDERAL GOVERNMENT AND MAY LEAD TO UNLAWFUL LOSS OF FEDERAL ASSETS

It is clear that the decision of the Utah Supreme Court in this case leaves the federal government holding assets which are either valueless to their grantees or over which the government must litigate the issue of title itself. Either circumstance results in a potentially serious drain on federal resources, and infringes on Congress' rights to dispose of federal property.

In this case, Salt Lake County knew the SBA became the owner of the property in 1981. It ignored the SBA's ownership and continued to assess the property throughout the time of federal ownership. It purported to sell the property at a tax sale which is admittedly void under the

authority of this Court's decision in United States v. Alabama. The SBA then transferred the property to petitioner who immediately filed suit to remove this cloud from his title. But the Utah court now has held that when the SBA transferred the property to petitioner, the property's title miraculously reverted back to those claiming under the void tax deed.

The Utah Court says the SBA could have avoided the tax deed but chose not to do so, clearly misunderstanding the distinction between a deed which is void and one which is merely voidable. Thus, the federal government has been deprived of its right to alienate its property, a deprivation to which Congress has not consented and which is in direct conflict with the law as stated by this Court in Alabama and Gibson. It is appropriate for this Court to correct the Utah Court, and reaffirm the federal government's absolute

authority in managing and disposing of its property interests, as well as the grantee's right to the enjoyment of the property conveyed by the federal government.

CONCLUSION

For the foregoing reasons, petitioner requests that a Writ of Certiorari issue in this case for review of the decision of the Utah Supreme Court.

DATED October 16, 1992.

Respectfully submitted,

ERIC P. HARTMAN
Counsel of Record

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF UTAH

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E. D. Shelledy,
Plaintiff and Appellant,

v.

Edward Lore, Alan Parsons, Erin Parsons, Roy Hockin, Harry Deckered, Kent C. Bangerter, Lloyd V. McBride, David C. Kunz, and Susan S. Kunz, individuals, Merit Distributing Inc., a Utah corporation, State Tax Commission of the State of Utah, Salt Lake County, and John Does I-X,
Defendants and Appellees.

No. 900074

FILED
April 14, 1992

Geoffrey J. Butler
Clerk

Third District, Salt Lake County
The Honorable James S. Sawaya

Attorneys: Eric P. Hartman, Salt Lake City, for Shelledy
R. Paul Van Dam, Salt Lake City, for Tax Commission
Mary Ellen Sloan, Salt Lake City, for Salt Lake County
Robert C. Liljenquist, Murray, for Deckered, Hockin, Bangerter, Kunz, McBride, Parsons, Merit Distributing

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HOWE, Associate Chief Justice:

Plaintiff E. D. Shelledy brought this action to quiet title to real property in Salt Lake County which he purchased from the Small Business Administration (SBA), a federal agency. All defendants except the State Tax Commission and Salt Lake County (hereinafter "defendants") claim title to the property under a tax deed issued by Salt Lake County at the May 1984 tax sale. The trial court granted summary judgment in favor of defendants, and plaintiff brings this appeal. We are called upon to determine whether Utah Code Ann. §78-12-5.2, which provides a four-year limitation on suits against holders of tax deeds, bars plaintiff's suit.

In 1978, Clare and Virginia Pearson, then owners of the subject property, failed to pay the general property taxes for that year. As a result, the property was sold

to Salt Lake County at the preliminary tax sale on January 15, 1979, pursuant to Utah Code Ann. §59-10-33 (current version at §59-2-1336 (Supp. 1991)). That preliminary sale triggered a four-year redemption period during which any person with an interest in that property could redeem the property by paying into the county treasury the amount due the county, all taxes subsequently assessed and all interest, penalty, and costs that have accrued. Utah Code Ann. §59-10-56 (current version at §59-2-1346 (Supp. 1991)).

In January, 1981, two years after the preliminary sale, the Pearsons conveyed their interest in the property by quitclaim deed to the SBA. Neither the Pearsons nor the SBA paid the delinquent taxes at that time. Notwithstanding the tax-exempt status of the SBA, Salt Lake County continued to levy taxes against the

property for the 1981, 1982, and 1983 tax years.

By May 1984, the redemption period had run and the delinquent taxes had not been paid. Consequently, the County conveyed the property by tax deed at the final May tax sale to defendant Edward Lore for $6,958.38.[1] This amount represented delinquent property taxes for 1978, 1980, 1981, 1982, and 1983, as well as the interest, penalties, and costs which had accrued during those years. Subsequently, Lore conveyed an undivided interest to each

---

[1]Property "held by the county under preliminary tax sale" is sold at the final May sale "following the lapse of four years from the date of the preliminary sale." Utah Code Ann. §59-10-56 (current version at §59-2-1346 (Supp. 1991)). Here, the preliminary sale occurred in January 1979; therefore, the property apparently should have been sold at the 1983 final May tax sale rather than at the 1984 tax sale. The facts are unclear as to the reason for this delay.

of the other defendants. These new owners failed to pay the 1984 property taxes, and on January 15, 1985, the tract was again sold to the County at the preliminary tax sale and another four-year redemption period began to run.

In December, 1988, nearly five years after the May 1984 tax sale, SBA conveyed its interest in the property to Shelledy. Three months later, Shelledy brought this action in the district court below to quiet title to the property against defendants who claimed title under the 1984 tax deed. By this date, the second redemption period had run and final sale of the property was pending at the May 1989 tax sale. To redeem the property, Shelledy paid under protest $6,007.39 into the county treasury. This sum represented the property taxes, interest, penalties, and costs owing for

1984, 1985, 1986, 1987, and 1988 which defendants had failed to pay.

Both plaintiff and defendant Salt Lake County filed motions for summary judgment. Plaintiff contended that while the tax liens for 1978 and 1980 remained valid after the SBA acquired the property in 1981, the sovereign immunity status of that agency barred the County from enforcing the liens and making future assessment of taxes against the property. Therefore, plaintiff argued, the 1984 tax sale was void. Shelledy urged the trial court to quiet title in his favor and award him the $6,007.39 he had paid under protest in 1989, less the amount of delinquent taxes owing on January 17, 1981, the date the SBA acquired title from the Pearsons.

On the other hand, Salt Lake County

contended that the SBA did not acquire title from the Pearsons, but only the right to redeem the property. It argued that this right was extinguished when the SBA failed to redeem within four years after the 1979 preliminary sale and, therefore, that the County had the right to sell the property at the May 1984 tax sale. In addition, it asserted that Shelledy's suit was barred by the four-year statute of limitation for challenging tax deeds, Utah Code Ann. §78-12-5.2,[2] and that Shelledy lacked standing to assert the immunity from

---

[2]In pertinent part, section 78-12-5.2 reads:

> No action or defense for the recovery or possession of real property or to quiet title or determine the ownership thereof shall be commenced or interposed against the holder of a tax title after the expiration of four years from the date of the sale, conveyance or transfer of such tax title to any county, or directly to any other purchase thereof at any public or private tax sale and after the expiration of one year from the date of this act.

taxation enjoyed by the SBA.

The trial court granted the County's motion for summary judgment for the above reasons advanced by the County. However, the court granted Shelledy a lien against the property for the $6,007.39 he paid under protest. Shelledy appeals from that judgment.[3] Because he appeals from a grant of summary judgment, we view the facts in a light most favorable to him and review the legal conclusion of the trial court for correctness, affording it no deference. Blue Cross and Blue Shield v. State, 779 P.2d 634, 636 (Utah 1989).

At the outset, it should be observed that we have held that following the preliminary tax sale, the property owner, although he is delinquent in his real

---

[3]On appeal, Salt Lake County is the only defendant to submit a brief. Six defendants whose title to the property was contingent upon the validity of the May 1984 tax sale joined the County's brief, claiming that it set forth all the arguments they had planned to raise.

estate taxes, maintains the underlying ownership interest in the property. Salt Lake Home Builders, Inc. v. Colman, 30 Utah 2d 379, 382-83, 518 P.2d 165, 167 (1974). Therefore, the quitclaim deed from the Pearsons to the SBA vested in the SBA fee simple title. Moreover, Utah Code Ann. §59-10-64(6) (current version at §59-2-1351(7) (Supp. 1991)) indicates that fee simple title to the property does not vest in the county unless it purchases it at the May tax sale. As to property which is listed for sale but not purchased by a private party at the final tax sale, the statute provides:

> The county auditor shall thereupon make an endorsement opposite each of the entries in the tax sale record ...

> substantially as follows: "The fee simple title to the property described in this entry was on the _____ day of May, 19__, sold and conveyed to the county of ___ _____ in payment of general taxes charged against the same," and shall sign his name thereto. The fee simple title to said property shall thereupon vest in the county.

(Emphasis added.) Thus title remains in the record owner following the preliminary sale; otherwise, there would be nothing to vest in the county after the May tax sale. See Salt Lake Home Builders, 30 Utah 2d at 382, 518 P.2d at 167. The trial court erred in concluding otherwise, but that error does not affect its decision.

The SBA is a federal agency entitled to the "full sovereign immunity of the

United States." United States v. Mel's Lockers, Inc., 346 F.2d 168, 169 (10th Cir. 1965). In support of Shelledy's contention that this immunity barred the County's attempt to enforce the prior tax lien for 1978, he relies on the United States Supreme Court decision of United States v. Alabama, 313 U.S. 274, 61 S. Ct. 1011, 85 L.Ed. 1327 (1941), a factually similar case. The United States brought suit to quiet title against Alabama, seeking a "decree declaring the liens, tax sales and certificates of purchase to be invalid and enjoining the State from asserting its claims." 313 U.S. at 277, 61 S.Ct. at 1012, 85 L.Ed. at 1330. The United States contended that it was entitled to this relief by virtue of its sovereign immunity. 313 U.S. at 279, 61 S.Ct. at 1013, 85 L.Ed. at 1331.

The Court determined that the liens

were valid, finding "no reason why the United States ... should stand, so far as the existence of the liens is concerned, in any different position from that of other purchasers of lands ... who take conveyances on and after the specified tax date." 313 U.S. at 282, 61 S.Ct. at 1014, 85 L.Ed. at 1332. The Court went on to hold, however, that the sovereign immunity of the United States barred the county's attempt to enforce the prior liens by tax sale. The Court reasoned:

> With respect to the tax sales the case has a different aspect. The proceedings in the county court for the sale of the lands were taken and the decrees were rendered after the United States had become the owner of the tracts. A proceeding against property in which the United

> States has an interest is a suit against the United States ... and in the absence of its consent to the prosecution of such proceedings, the county court was without jurisdiction and its decrees, the tax sales and the certificates of purchase issued to the State were void.

313 U.S. at 282, 61 S.Ct. at 1014, 85 L.Ed. at 1332-33 (citation omitted). Thus, the Court held that while the acquisition of property by a sovereign entity did not destroy the validity of a prior lien, it rendered the lien unenforceable absent the consent of the sovereign entity.

Alabama, however, is not dispositive here. The SBA is not a party to this action because it no longer has an interest in the property. The SBA may have been able to avoid the 1984 tax sale of its

property on the authority of Alabama, but it did not attempt to do so.

Plaintiff now contends that he has standing to assert the SBA's immunity from taxation and thereby prevent the four-year statute of limitations contained in section 78-12-5.2 from running against him. As a general rule, courts do not permit a party to assert the constitutional rights of a third party. Barrows v. Jackson, 346 U.S. 249, 255, 73 S.Ct. 1031, 1034, 97 L.Ed. 2d 1586, 1594 (1953); State v. Harding, 576 P.2d 1284, 1285 (Utah 1978); Kemmerer Coal Co. v. Brigham Young University, 723 F.2d 54 (10th Cir. 1983). The general rule is that a litigant "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interest of third parties." Warth v. Seldin, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed. 2d 343, 355 (1975)

(citations omitted). However, a party may assert the constitutional rights of a third party if certain factors are met: "first, the presence of some substantial relationship between the claimant and the third parties; second, the impossibility of the rightholders asserting their own constitutional rights; and third, the need to avoid a dilution of third parties' constitutional rights that would result were the assertion of jus tertii not permitted." Note, Standing to Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423, 425 (1975). See generally Henry P. Monaghan, Third Party Standing 84 Colum. L.Rev. 277 (1984); Lawrence H. Tribe, American Constitutional Law §3-19 (2d ed. 1988).

None of the above are present in the instant case. No substantial relationship exists between Shelledy and the SBA; the

SBA has never been precluded from asserting its immune status; and finally, there has been no dilution of Shelledy's constitutional rights.

In Frederiksen v. LaFleur, 632 P.2d 827, 831 (Utah 1981), we held that "tax purchasers may avail themselves of the special statute of limitation regardless of either the invalidity of their tax title or their inability to establish an affirmative claim to title apart from their tax title." We expressly reserved voicing any opinion "on whether the special statute of limitations could protect a tax title acquired by means repugnant to fundamental fairness or whether such an application of the statute would exceed the limits of statutory intent or constitutional permissibility." Id. at 831 n.14. Later, the United States Court of Appeals for the Tenth Circuit in Kemmerer Coal, 723 F.2d at

57, held that under Utah law the four-year statute of limitation barred an attack on a tax deed held by Brigham Young University. Kemmerer Coal Co., which had succeeded to the interest of San Rafael Fuel Co., attacked the tax deed because of the lack of notice of the tax assessment to the owner, San Rafael. There, the court wrote:

> We need not decide whether the analysis in [Saranac Land & Timber Co. v. Roberts, 177 U.S. 318, 329-31, 20 S.Ct. 642, 647, 44 L.Ed. 786, 792-93 (1900)] would survive current constitutional jurisprudence, however, because Kemmerer itself has suffered no due process injury. If a constitutional violation occurred, it was the taking of San Rafael's property wihtout due process. Kemmerer

thus seeks to advance its claim by asserting a third-party's constitutional rights... .

We believe the Utah Supreme Court would hold that Kemmerer has no standing to assert a third-party's constitutional rights under the facts of this case. While it may have been "repugnant to fundamental fairness," Frederiksen, 632 P.2d at 831 n.14, to deprive San Rafael of its property without proper notice, we do not believe it fundamentally unfair to apply the statute of limitations to Kemmerer who bought the coal lands in the face of record notice of a rival claim to "underground rights."

Id. at 57-58 (citations omitted). The

Tenth Circuit made an accurate forecast.

When Shelledy purchased the property from the SBA in 1988, he was on record notice of defendants' rival claim to the property by virtue of the 1984 tax deed. Therefore, we hold that Shelledy lacks standing to assert the SBA's constitutional rights and defense.

Our statutory definition of "tax title" is, in relevant part:

> "[T]ax title"...means any title to real property, whether valid or not, which has been derived through or is dependent upon any sale, conveyance, or transfer of property in the course of a statutory proceeding for the liquidation of any tax levied against the property whereby the property is relieved from a tax lien.

Utah Code Ann. §78-12-5.3 (emphasis added). To give full effect to the above statute, it makes no difference if the tax title is valid. Once the four-year statute of limitation has run, the tax title cannot be attacked. Such interpretation is entirely consistent with our decision in Frederiksen. As we stated in that case, the reason for this statute of limitation on tax deeds is "to give increased stability to tax titles and thereby augment the revenues of state and local governments ... ." 632 P.2d at 828. We see no reason to depart from our precedent.

Because Shelledy paid under protest the $6,007.39 in delinquent taxes, interest, and penalties owing on the property as of March 1989 and thereby redeemed the property for defendants, Shelledy is entitled to a lien on the property for that amount plus interest.

The judgment of the trial court is affirmed.

WE CONCUR:

Gordon R. Hall Chief Justice	I. Daniel Stewart Justice
Christine M. Durham Justice	Michael D. Zimmerman Justice

APPENDIX B

ERIC P. HARTMAN, No. 1400
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IN THE DISTRICT COURT OF SALT LAKE COUNTY,
STATE OF UTAH

E. D. SHELLEDY, Plaintiff, vs. EDWARD LORE, ALAN PARSONS, ERIN PARSONS, ROY HOCKIN, HARRY DECKERED, KENT C. BANGERTER, LLOYD V. McBRIDE, DAVID C. KUNZ, SUSAN S. KUNZ, individual, MERIT DISTRIBUTING INC., a Utah corporation, STATE TAX COMMISSION OF THE STATE OF UTAH, SALT LAKE COUNTY, and JOHN DOES I-X, Defendants.	)	O R D E R Civil No. 890901388 PR Judge James Sawaya

---

Plaintiff E. D. Shelledy's and defendant Salt Lake County's Cross-Motions for Summary Judgment came on regularly for

hearing on December 18, 1989, in the Third Judicial District Court in and for Salt Lake County, the Honorable James S. Sawaya presiding. Plaintiff was represented by his counsel, Eric P. Hartman. Salt Lake County was represented by Deputy County Attorney Mary Ellen Sloan. Counsel for various other defendants, Robert Liljenquist, was present but did not argue.

The court, following argument and being fully advised in the premises,

IT IS HEREBY ORDERED:

1. Salt Lake County's Motion for Summary Judgment is granted on all issues on the bases and for the reasons stated in its memoranda; and plaintiff's Motion for Summary Judgment is denied on all issues.

2. Salt Lake County's May 1984 tax sale was valid and title to the property in dispute is quieted in the tax sale purchaser or his successors in interest.

3. The property was subject to taxation by Salt Lake County during all times relevant herein.

4. Plaintiff is entitled to a statutory lien against the property for any tax payments made on the property.

5. The court's ruling resolves all issues between all parties herein, or alternatively, the court, finding no just reason for delay, directs entry of judgment on the above claims and certifies this Order as final for purposes of appeal pursuant to Rule 54(b) of the Utah Rules of Civil Procedure.

DATED January 17, 1990.

BY THE COURT:

JAMES S. SAWAYA
Third District Judge

APPROVED AS TO FORM: APPROVED AS TO FORM:

MARY ELLEN SLOAN
Deputy County
Attorney

ROBERT LILJENQUIST
Attorney at Law

MAILING CERTIFICATE

I certify that on January ___, 1990, I mailed a copy of the foregoing Order, U.S. mail, postage prepaid, to the following:

Edward Lore, defendant
440 North 800 East
Kaysville, UT 84037

Mary Ellen Sloan
Salt Lake County Attorney's Office
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APPENDIX C

SUPREME COURT OF UTAH

STATE OF UTAH

SALT LAKE CITY, UTAH

JULY 21, 1992

OFFICE OF THE CLERK

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E. D. Shelledy,
Plaintiff and Appellant,

v.

Supreme No. 900074
District No. 890901388

Edward Lore, Alan Parsons, Erin Parsons, Roy Hockin, Harry Deckered, Kent C. Bangerter, Lloyd McBride, et al.
Defendant and Appellee.

THIS DAY, Petition for Rehearing having been heretofore considered, and the Court being sufficiently advised in the premises, it is ordered that a rehearing be, and the same is, denied.

Geoffrey J. Butler
Clerk

Supreme Court, U.S.
FILED
NOV 13 1992
OFFICE OF THE CLERK

No. 92-692

In The

Supreme Court of the United States

October Term, 1992

E. D. SHELLEDY,

Petitioner,

v.

EDWARD LORE, et al.,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Utah

BRIEF IN OPPOSITION OF RESPONDENT SALT LAKE COUNTY

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QUESTIONS PRESENTED

Does a grantee by quit claim deed have standing to assert the tax immunity of the grantor United States to void a tax deed when the statute of limitations is raised as a defense.

Did Utah infringe upon the federal government's power to manage and dispose of its property by finding the government's grantee lacked standing to assert the immunity of the United States to void a tax deed when the state four year statute of limitations is raised as a defense.

Does a tax deed which is voidable due to jurisdictional defects in the proceedings pass good title when the four year statute of limitations has run.

LIST OF PARTIES

The parties to the proceedings below were the petitioner E. D. Shelledy and the respondents Edward Lore, Alan Parsons, Erin Parsons, Roy Hockin, Harry Deckered, Kent C. Bangerter, Lloyd V. McBride, David E. Kunz and Susan S. Kunz, individuals, Merit Distributing, Inc., a Utah corporation, State Tax Commission of the State of Utah, and Salt Lake County.

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No. 92-692

In The

Supreme Court of the United States

October Term, 1992

E. D. SHELLEDY,

Petitioner,

v.

EDWARD LORE, et al.,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Utah

BRIEF IN OPPOSITION OF RESPONDENT SALT LAKE COUNTY

The respondent Salt Lake County respectfully requests this Court deny the petition for writ of certiorari seeking review of the Utah Supreme Court's opinion in this case. The opinion is reported at 836 P.2d 786 (Utah 1992).

OPINIONS BELOW

The opinion of the Utah Supreme Court is reported at 836 P.2d 786 (Utah 1992). The Order denying the timely petition for rehearing is reprinted in the Appendix to the Petition, p. C1. The Order of the trial court of the Third

District Court in and for Salt Lake County, State of Utah (Sawaya, District Judge), was not reported. It is reprinted in the Appendix to the Petition, p. B1.

JURISDICTION

The judgment of the Supreme Court of the State of Utah was entered on April 14, 1992, affirming the decision of the lower court dated January 17, 1990. The Utah Supreme Court denied a timely petition for rehearing on July 21, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTES INVOLVED

Utah Code Ann. § 78-12-5.2 provides in pertinent part:

> *Holder of tax title – Limitations of action or defense – Proviso.* No action or defense for the recovery or possession of real property or to quiet title or determine the ownership thereof shall be commenced or interposed against the holder of a tax title after the expiration of four years from the date of the sale, conveyance or transfer of such tax title to any county, or directly to any other purchaser thereof at any public or private tax sale and after the expiration of one year from the date of this act.

Utah Code Ann. § 78-12-5.3 provides in pertinent part:

Definitions of "tax title" and "action."

(1) the term "tax title" as used in § 78-12-5.1 and § 59-2-1364, and the related amended §§ 78-12-5, 78-12-7, and 78-12-12, means any title to real property, whether valid or not, which has been derived through or is dependent upon any sale, conveyance, or transfer of property in the course of a statutory proceeding for the liquidation of any tax levied against the property whereby the property is relieved from a tax lien.

STATEMENT OF THE CASE

Salt Lake County incorporates the statement of facts set forth in the opinion of the Utah Supreme Court and adds that the transfer from the Small Business Administration to Petitioner was by quit claim deed.

REASONS WHY THE PETITION SHOULD BE DENIED

The petition should be denied because it is not of sufficient import to warrant further consideration. An unanimous court gave full consideration to the issues and decided them correctly when it held the Petitioner did not have standing to assert the sovereign immunity of the United States in a quiet title action when the statute of limitations has been raised as a defense. The Petitioner purchased property from the SBA while on notice of a rival tax deed and that the time in which to challenge the tax deed had run.

Further, the Petitioner was treated fairly in the state court proceedings. He was granted a lien against the property for the amount of taxes which he paid plus interest. The United States hasn't been injured. The quit claim deed is evidence it received valuable consideration and has not been deprived of its ability to manage and dispose of its property. The Court correctly applied the law in that the United States is not the real party in interest and only Petitioner will benefit from the setting side of the tax deed.

Finally, balanced against Petitioner's interest is the state policy behind the statute of limitations on tax deeds, which is to give increased stability to tax titles and thereby augment the revenues of state and local governments.

I.

THE UTAH SUPREME COURT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF THIS COURT AND DECISIONS OF THE HIGHEST COURTS OF OTHER STATES.

A. IN THE CONTEXT OF THE FACTS, THE DECISION IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT.

The general rule is the statute of limitations does not run against the United States with respect to the disposition of the public domain or public lands. The cases cited by the Petitioner are in accord with this rule but all involve public lands. "Public lands" means lands which are subject to "sale or other disposal under general laws." *Northern Lumber Company v. O'Brien*, 204 U.S. 190 (1907).

The term does not include all land owned by the United States. "Land to which any claims or rights of others have attached do not fall within this designation." *Western Nuclear, Inc. v. Andrus*, 664 F.2d 234, 237 (10th Cir. 1981), citing *Payne v. Central Pacific Railway Company*, 255 U.S. 288 (1921); *Columbia Basin Land Protection Ass'n. v. Schlesinger*, 643 F.2d 585 (9th Cir. 1981). The term "public lands" is "uniformly regarded as not including lands to which rights have attached and became vested through full compliance with applicable land law." *Payne v. Central Pacific Railway Company*, 255 U.S. 237, 238. It means "lands which are open to settlement or other disposition under the laws of the United States, and does not encompass lands in which rights of public have passed and which have become subject to the individual rights of a seller." *Hamerly v. Denton*, 359 P.2d 121 (Alas. 1961).

The County's tax liens attached prior to the Small Business Administration's acquisition by quit claim deed. The SBA acquired a title encumbered by taxes lawfully assessed and levied, and subject to prior tax sales. *State v. Salt Lake County*, 85 P.2d 851, 854 (1938). Thus, under the authority of *Payne v. Central Pacific Railway Company*, *Western Nuclear Inc. v. Andrus*, and *Columbia Basin Land Protection Ass'n. v. Schlesinger*, the subject property, when encumbered by the County's tax liens prior to the SBA ownership, is not "public land" or the "public domain." It was not subject to disposition under the general laws of the United States. The fact a patent was not issued is prima facie evidence of this premise.

The rule relied upon by Petitioner has its origin in the distribution of the public domain in the 1800's. The policy was directed to prevent adverse possession by

trespassers, as reflected in *Lindsey v. Miller's Lessee*, 31 U.S. [6 Pet.] 666 (1832).

> It is a well-settled principle, that the statute of limitations does not run against a state. If a contrary rule were sanctioned, it would only be necessary for intruders upon the public lands to maintain their possessions, until the statute of limitations shall run; and then they would become invested with the title, against the government, and all persons claiming under it. In this way, the public domain would soon be appropriated by adventurers. Indeed, it would be utterly impracticable, by the use of any power within the reach of the government, to prevent this result. It is only necessary, therefore, to state the case, in order to show the wisdom and propriety of the rule that the statute never operates against the government." *Id.*, 31 U.S. [6 Pet.] at 672.

Even if the property had been "public domain" or "public lands," and if the United States were to have instituted this action, if it has no real interest in the case and the sole beneficiary of its action will be a private person, the defense of the statute of limitations is available, in the same manner as in suits between private parties. *United States v. Beebee*, 127 U.S. 338 (1888); *Curtner v. United States*, 149 U.S. 662 (1893).

In *Beebee*, the United States sued to set aside patents it had issued in favor of Beebee. It contended the patents were obtained through fraud and were void. The Court held that when the United States is not the real party in interest to the title or to land in controversy and the

benefit will accrue to a private party, the statute of limitations may be asserted against the United States as if it were a contest between private litigants. The Court held that the patents could not be set aside as void because the statute of limitations barred the action.

Under *Curtner*, if the suit is brought for the benefit of a third party, and the United States has no pecuniary interest in the remedy and is under no obligation to the party who will benefit, the statute of limitations is a defense.

> The government must show that, like the private individual, it has such an interest in the relief sought as entitles it to move in the matter. . . . [i]f it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use, – in short, if there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of its own, – it can no more sustain such an action than any private person could under similar circumstances." *Id.*, 149 U.S. at 988.

The underlying policy for applying the rule on the statute of limitations as urged by Petitioner among private litigants does not exist in this case. *Public Lands*, 63A Am.Jur.2d 130.

In conclusion, there is no underlying legal or policy reason why the statute of limitations should not run in an action between private parties where the United States no longer has an interest in the property or any legal obligation to defend the title it conveyed.

The Court's ruling does not conflict with or "eviscerate" *United States v. Alabama*, 313 U.S. 274 (1940). *Alabama* is not dispositive because the SBA was not a party to this action and no longer had an interest in the property. *Shelledy v. Lore, et al.*, 836 P.2d 786. Further, *Alabama* did not involve the assertion of a grantee by quit claim deed of the right to claim the sovereign immunity of the United States as a defense to the running of the statute of limitations.

Because the defense of the statute of limitations was not before the Court, *Alabama* did not distinguish between deeds which are void on their face as opposed to deeds which are facially valid and therefore voidable. This case is limited to a unique set of facts where a grantee by quit claim deed acquired property when on notice of a rival tax deed, the expiration of the statute of limitations to challenge the validity of the deed and the rule of law that the statute will run if the deed is facially valid. *Hansen v. Morris*, 3 Utah 2d 310, 283 P.2d 884 (1955). Point III, *infra*.

B. IN THE CONTEXT OF THE FACTS, THE DECISION IS NOT IN CONFLICT WITH OTHER STATE COURT DECISIONS.

None of the cases cited by Petitioner in support of his claim to standing involve challenges to the validity of a tax deed when the statute of limitations has been raised as a defense. Further, in *Daniell v. Sherrill*, 48 So.2d 736 (Fla. 1950), the tax deed prevailed over the rival deed from the United States. The tax deed purchasers raised the defense of estoppel against the State of Florida. The

State had succeeded to the interest of the United States in property which the State had previously sold at tax sale at a time it was held by the United States. The Court held the State was estopped from asserting the invalidity of its own sale on grounds of equity and was barred by its own tax sale documents which purported to convey title to the property. Notably the statute of limitations had not been raised as a defense.

II.

IN THE CONTEXT OF THE STATUTE OF LIMITATIONS, THE COURT'S DECISION ON STANDING IS CORRECT.

A. UNDER THE FACTS AND LAW PETITIONER LACKS STANDING.

None of the cases relied on by Petitioner address the issue of standing in the context of the statute of limitations defense. Even if this Court were to find Petitioner could assert the sovereign immunity of the United States, the doctrine of sovereign immunity is not without limit. *United States v. New Mexico*, 455 U.S. 720 (1982). Under the circumstances of this case, the doctrine does not apply.

In *State and Local Taxation*, 71 Am.Jur.2d § 224, a general discussion of sovereign immunity is set forth in pertinent part as follows:

> The principle which prevents a state from levying a tax which will curtail in any substantial manner the exercise of the powers of the Federal Government has its inherent limitations. Its application must be practical and have regard for the circumstances disclosed. The end

> sought to be attained is important. The immunity is for the protection of the government, and extends no further than is necessary for that purpose. It does not extend to anything lying outside or beyond governmental functions and their exertion. It does not exist where no direct burden is laid upon the governmental instrumentality and there is only a remote, if any, influence upon the exercise of the functions of the government. (Citations omitted).

Petitioner has failed to prove any direct burden on the government or influence on the exercise of the function of the government. He asserts that to deprive a grantee of property received from the United States impairs the federal government's ability to manage and dispose of its property. The fact property may be less marketable is not the burden intended to cause application of the doctrine of sovereign immunity. *Northside Canal Co. v. State Board of Equalization*, 8 F.2d 739 (D. Wyo. 1925). Further, his assertion is rebutted by the quit claim deed itself which reflects a sale for valuable consideration.

This Court has held that property purchased by a private person from the federal government becomes a part of the general mass of property in the state and must bear its fair share of the expenses of local government, even though the prospect of taxation by the state may reduce the amount that the United States might receive from the sale of its property. *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342 (1948).

Thus, Petitioner cannot assert a burden which was not borne by the United States as a reason to cloak him

with the sovereign immunity of the United States. The burden, if any, is remote. Because it is remote, sovereign immunity does not protect him.

The Petitioner further asserts that the statute of limitations could not commence to run while the title to the property was in the SBA and, thus, this action is not barred by the defense of the statute of limitations. As a general rule, the statute of limitations does not run against the sovereign. *Lindsey v. Miller's Lessee*, 31 U.S. [6 Pet.] 666 (1823); *Limitation of Actions*, 51 Am.Jur.2d § 409. However, where the government has no real interest in the litigation, the defense of the statute of limitations is available the same as if the litigation were between individuals. *United States v. Beebee; Curtner v. United States; Limitation of Actions*, 51 Am.Jur.2d § 410. Thus, even if the United States were a nominal party and this action had been brought in its name, if the United States has no real interest in the litigation and the benefit to come from the litigation will inure to the benefit of an individual such as Petitioner, the statute of limitations may be asserted as a defense to the suit. *McNutt v. Cox*, 129 S.W.2d 626 (Tex. 1939); *Limitation of Actions*, 51 Am.Jur.2d § 410.

Petitioner has failed to cite any cases which support his position that the statute of limitations is not a valid bar to his claim even though the grantor was the United States. The Petitioner, and not the United States, is the real party in interest. A real party in interest is one who has the right to control and receive the fruits of the litigation. *Preston v. Iron County*, 105 Wis.2d 346, 314 N.W.2d 131 (Wis. App. 1981). If Petitioner prevails, the tax deed issued by Salt Lake County will be set aside and title quieted in himself. Under such circumstances, the

fact the United States may have been in the chain of title does not affect the running of the statute of limitations as it applies to the Petitioner's claim.

B. THE TENTH CIRCUIT'S DECISION IS PERSUASIVE AUTHORITY.

Interpreting the Utah statute before this Court and the decisions of the Utah Supreme Court interpreting it, the Court of Appeals in *Kemmerer Coal Co. v. Brigham Young University*, 723 F.2d 54 (10th Cir. 1983), considered the standing of a grantee to assert the constitutional violation of its grantor in order to set aside a rival tax deed, where the statute of limitations had been raised as a defense. The court held Kemmerer Coal Company had no standing to assert the violation of the constitutional rights of its grantor as a basis to void a tax sale otherwise barred for lack of timeliness by the statute of limitations.

It asserted that the due process rights of its grantor, San Rafael, had been violated by the County because it received no notice of the tax assessment and received only publication notice of the sale of the coal rights. This notice listed strangers to the title as owners. The court acknowledged that San Rafael's constitutional right to due process may have been violated by Emery County. Kemmerer asserted that the statute of limitations did not bar the due process attack on the title derived from the tax deed because the tax title was void because of the due

process violation. The court rejected that argument and stated its reasoning as follows:

> . . . Kemmerer itself has suffered no due process injury. If a constitutional violation occurred, it was the taking of San Rafael's property without due process. Kemmerer thus seeks to advance its claim by asserting a third-party's constitutional rights. "[T]he general rule is that a litigant may only assert his own constitutional rights or immunities." (citations omitted)
>
> * * *
>
> We believe the Utah Supreme Court would hold that Kemmerer has no standing to assert a third-party's constitutional rights under the facts of this case. While it may have been "repugnant to fundamental fairness," *Frederiksen*, 632 P.2d at 831 n. 14, to deprive San Rafael of its property without proper notice, we do not believe it fundamentally unfair to apply the statute of limitations to Kemmerer who bought the coal lands in the face of record notice of a rival claim to "underground rights." 723 F.2d at 57-58.

Similarly, it is not fundamentally unfair or in excess of constitutional permissibility to apply the statute of limitations to bar Petitioner's quiet title action when he asserts an immunity solely that of the United States, while on notice of a rival claim due to a 1984 tax deed and the expiration of the statute of limitations.

C. PETITIONER'S ACTION IS NOT WITHIN THE EXCEPTION TO THIRD PARTY STANDING DOCTRINE.

The Utah Supreme Court correctly held Petitioner did not come within the exception to the third party standing doctrine. He asserts injury to the United States in that it will not be able to manage or dispose of its property in light of the Utah Supreme Court's decision.

First, Petitioner failed to show a substantial relationship between himself and the SBA. His interest is founded upon a quit claim deed from the SBA, which founded its interest on a quit claim deed encumbered by tax liens. "Such deeds do not imply the conveyance of any particular interest in the property. . . . Plaintiffs acquired only the interest of their grantors, be that interest what it may." *Nix v. Tooele County*, 118 P.2d 376, 377 (Utah 1941). The SBA did not warrant title. Had it done so, perhaps such a relationship would exist.

As to the second requirement of jus tertii, the SBA could have asserted its rights by merely intervening in the proceedings before the trial court or could have provided evidence as to the economic burden. But there is no evidence in the record of economic burden on the United States. The SBA had a buyer willing to pay valuable consideration notwithstanding notice of the rival tax deed and the passage of the state statute of limitations.

Thirdly, there is no dilution of the SBA's rights. The quit claim deed is the only evidence of the transaction between it and Petitioner. It is proof the SBA received full and valuable consideration as a grantor. In the context of the statute of limitations defense, the United States is not

the real party in interest and the statute should run as it should in litigation between private parties.

III.

PETITIONER FAILS TO DISTINGUISH BETWEEN DEEDS VOID ON THEIR FACE AND DEEDS WHICH ARE VOIDABLE.

The statute of limitations will run against deeds which are facially valid but will not run if the deed is void on its face. Petitioner has never contended that the 1984 tax deed was void on its face. He claims the deed is void because the SBA's interest in the property removed the property from the County's taxing jurisdiction. His argument is that any sale of the property for taxes would be void; if a tax sale is void, the statute of limitations will not run. However, his contention is not supported by the authorities he relies upon and is not the law in Utah.

Petitioner contends that *Hansen v. Morris*, 3 Utah 2d 310, 283 P.2d 884 (1955), supports his argument that the statute of limitations will not run if a deed is void for lack of jurisdiction. In *Hansen v. Morris*, the Court held that the statute of limitations will not run if the deed is *void on its face*. It also held that the statute will run if the tax deed is valid on its face and issued by the proper governmental authority:

> In passing, we do not wish it understood that our decision is applicable to conveyances void on their face, such as those containing no grantor, grantee, description, etc., or to those that may be forged or the like, *but only to those valid on their face, as here, and executed by the same authority that could have passed good title* if each

> and every statutory step in perfecting a tax title had been followed, without the aid of limitations statute. (Emphasis added.) 283 P.2d at 887.

None of the cases cited in the footnote to the quote address the issue raised by Petitioner and the statute of limitations was held in each case to bar the action. *Jones v. Russell*, 194 So. 290 (Miss. 1940) (two year statute of limitations is intended to cut off inquiry into the merits of the validity of the tax sale); *Strauss v. Thompson*, 71 P.2d 994 (Okla. 1935) (action to cancel tax deed which was not void on its face is barred by the one year statute of limitations); *Eagles v. General Electric Company*, 104 P.2d 912 (Wash. 1940) (the statute of limitations will run even though a deed is void).

Further, *Baxter v. Utah Department of Transportation*, 783 P.2d 1045 (Ut. App. 1989), does not support his position either. In *Baxter*, the issue before the Court was whether the property which had been sold at tax sale was situated in Davis or Weber County. It was contended that the tax deed from Davis County was void because the property was located in Weber County and as a result Davis County "had no authority to tax the property, to acquire title when taxes were unpaid, or to convey title through a tax deed." *Baxter*, 783 P.2d 1045, 1047. Davis County could not convey a valid title through tax sale to property situated in another county.

Petitioner is correct in his assertion "the statute of limitations is without application to void deeds." Vol. 5B Thompson, *Real Property*, § 2766 (1978). The above quote is footnoted with reference to several cases. Those cases reveal that the scope of the assertion is primarily limited to deeds void on their face. *Pierce v. Barrett*, 220 P. 652

(Okla. 1923); *Adams v. Mottley*, 223 P. 356 (Okla. 1924) (tax deed defective on its face is not sufficient to set statute of limitations in operation); *Loper v. E. W. Gates Lbr. Co.*, 98 So. 722 (Ala. 1923) (statute of limitations inapplicable to tax sale where owner paid taxes before sale); *Goodrich v. Darr*, 256 S.W. 868 (Ark. 1923) (tax deed void due to defect on face of deed; hence, statute of limitations does not run); *Harang v. Gheens Realty Co.*, 155 La., 98 So. 760 (La. 1923) (statute of limitations does not run against tax deeds which did not include property within tax deed description).

Petitioner also refers to P. Lear, *Utah's Short Statutes of Limitations for Tax Titles: The Continuing Specter of Lyman v. National Mortgage Bond Corp., – A Need for Remedial Legislation*, 76 BYU L. Rev. 457, 467 (1976) for authority that where a deed is void due to jurisdictional defect, the statute of limitations favoring tax deeds do not run. Petitioner has misinterpreted Lear's statement which is set forth in pertinent part as follows:

> Special or short statutes of limitation do not run where the tax deed is absolutely void on its face – not merely voidable – due to some jurisdictional defect or where the jurisdictional defect, not apparent on the face of the deed, entails an irregularity in the proceedings . . .
>
> . . . In most states, however, where the deed is valid on its face and is voidable merely for some irregularity in the proceedings, the limiting statute runs from the date of execution and delivery of the deed or, in some cases, from the date of recording, regardless of possession. P. Lear, *Ibid.*, p. 468.

Reliance on *Redfield v. Parks*, 132 U.S. 239 (1889), is also misplaced. The Court found the deed to be *void on its face* because it was sold at tax sale on a different date than that recorded on the face of the deed. Thus, the general rule applies that the statute will run, but it is not authority on the issues before the Court.

In summary, the statute of limitations will run if the deed is facially valid, even though the deed is voidable due to a jurisdictional defect such as alleged by Petitioner. The Utah Supreme Court specifically adopted this rule in *Hansen v. Morris*, 283 P.2d 884 and in *Frederiksen v. LaFluer*, 632 P.2d 827 (Utah 1981), when it held that the statute of limitations would bar a challenge to the tax deed even though the tax deed was invalid.

In conclusion, neither *Hansen v. Morris*, *Baxter v. Utah Department of Transporation*, nor the scholarly authorities support the Petitioner's argument the deed is void. The deed is valid on its face and issued by Salt Lake County, which had jurisdiction over the subject property and therefore the statute of limitations will run.

IV.

THE RECORD DOES NOT SUPPORT PETITIONER'S ASSERTION OF IMPERMISSIBLE BURDEN ON THE UNITED STATES OR A LOSS OF FEDERAL ASSETS.

The decision of the Utah Supreme Court applies only to this specific fact situation. No evidence of economic burden was presented by Petitioner. Rather, the only evidence in the record is the quit claim deed and it directly rebuts Petitioner's assertion of economic burden.

It is evidence the SBA sold the property for valuable consideration and represents no loss of federal assets.

CONCLUSION

For the foregoing reasons, respondent requests the Court deny the petition for a writ of certiorari.

Respectfully submitted,

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(3)

Supreme Court, U.S.
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No. 92-692

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

E. D. SHELLEDY, Petitioner

v.

EDWARD LORE, et al., Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

REPLY BRIEF OF PETITIONER

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I.

SALT LAKE COUNTY HAS NOT RESOLVED CONFLICT OF UTAH DECISION WITH DECISIONS OF THIS COURT.

Salt Lake County suggests on page 11 of its Brief in Opposition that Petitioner has failed to cite any cases which support his position that the statute of limitations is not a valid bar to his claim to the property when the grantor was the United States. On the contrary, several cases cited by Petitioner stand for that very proposition.

Gibson v. Chouteau, 13 Wall. [80 U.S.] 92, 20 L.Ed. 534 (1871) stated in the strongest terms that no state limitations period could run while the property belonged to the United States to deprive the government's grantee of the right to possess and enjoy the land. Simmons v. Ogle, 105 U.S. 271, 26 L.Ed. 1087 (1881) declares that neither limitations statutes

nor equitable doctrines such as laches can begin to effect any grantee of the government until legal title is conveyed. Redfield v. Parks, 132 U.S. 239, 33 L.Ed. 327 (1889) holds that while title to property is in the United States, no adverse possession of it under a state statute of limitations can confer title as against that asserted in an action of ejectment brought by a grantee claiming legal title from the United States.

This principle that no state limitations period can run while title is in the United States was so well settled as to be no longer open to discussion until the Utah Supreme Court's decision herein, which seeks to contradict this Court's long-held principles under the rubric of standing doctrine.

A. Petitioner's Cited Cases Not Distinguishable On "Public Lands" Issue.

Salt Lake County attempts to

distinguish the cases cited above and in the Petition for Writ of Certiorari by asserting that they dealt with the disposition of "public lands" and that this case does not. This argument fails for two reasons: first, the property at issue in the instant case is within the definition of "public lands," and, second, whether it was "public lands" is not material to the effect of the immunity of the United States upon the title dispute herein.

"Public lands" is most frequently defined as being lands of the United States which are subject to "sale or other disposal under general laws." Such general laws would include the provisions of the Small Business Act found at 15 U.S.C. §631 et seq. Specifically, §634(b)(3) provides that the Small Business Administrator may "... sell for cash or credit upon such terms and conditions and for such consideration as the Administrator shall

determine to be reasonable, any real property conveyed to or otherwise acquired by him in connection with the payment of loans granted under this Act."

It was pursuant to and fully within the scope of this authority that the Small Business Administration (SBA) conveyed the property in dispute herein to Petitioner. Although it is frequently stated in the cases that the term "public lands" does not include those lands to which claims or rights of others have attached, a review of the cases indicates this is simply another means of stating that the government no longer has authority to sell the land under general laws because it was withdrawn from the public domain by prior appropriation such as by sale to a private party, withdrawal under a prior land grant, or a valid entry under homestead laws. All the "public lands" cases cited by Salt Lake County in its Brief in Opposition are of

this sort: Northern Lumber Co. v. O'Brien, 204 U.S. 190 (1907) (land previously withdrawn in an earlier grant); Western Nuclear, Inc. v. Andrus, 664 F.2d 234 (10th Cir. 1981) (privately held land in which U.S. retained mineral rights); Payne v. Central Pacific Rwy. Co., 255 U.S. 228 (1921) (land included in prior land grant); Columbia Basin Land Protection Ass'n. v. Schlesinger, 643 F.2d 585 (9th Cir. 1981) (privately held land in which U.S. retained mineral rights); Hamerly v. Denton, 359 P.2d 121 (Alaska 1961) (withdrawn from public lands by a valid entry under homestead laws).

No case cited by Salt Lake County (and Petitioner believes none exist) hold that the existence of a mere lien against property of the United States removes it from the public domain. This is because a mere lien such as Salt Lake County claimed against the property does not deprive the

titleholder, whether it be the United States or a private party, of the power of sale or disposition of that land. The Utah Supreme Court acknowledges this fact in its opinion in this case, as well as other cases. Shelledy v. Lore, 836 P.2d 786, 788 (Utah, 1992); Salt Lake Home Builders, Inc. v. Colman, 30 Utah 2d 379, 518 P.2d 165 (1974); Dillman v. Foster, 656 P.2d 974 (Utah 1982). Since a mere lien interest does not deprive the titleholder of the power to sell or dispose of the land, it is not removed from the public domain.

Furthermore, Petitioner submits that whether the property was "public lands" is not a material fact in the Court's decisions in the Gibson, Simmons, Redfield and similar cases. Salt Lake County's apparent contention is that the federal government doesn't mind that its assets are taken from it without its consent, except where those assets are part of "public

lands." This is, of course, not the case, and the fact that most decisions addressing sovereign immunity issues in the context of the government's grantees involve public lands does not limit the immunity of the United States to such circumstances.

The fundamental proposition which is the basis of these decisions is the settled rule of sovereign immunity that an action against property in which the United States has an interest is an action against the United States. Minnesota v. United States, 305 U.S. 382, 595 S.Ct. 292, 83 L.Ed. 235 (1939). Absent the consent of the United States, any court or taxing authority conducting such proceedings is without jurisdiction and any actions taken are void. United States v. Alabama, at 313 U.S. 282. Once the SBA became owner of the property at issue here, Salt Lake County lacked jurisdiction because Congress has not consented to the foreclosure of a tax

lien against property to which the United States held title. The County's actions were void and no limitations period could frustrate the SBA's exercise of management and disposal of the property or Petitioner's right to its enjoyment. Gibson v. Chouteau, at 13 Wall. [80 U.S.] 100.

B. Real Party In Interest Cases Are Not Applicable to the Issues of This Case.

Salt Lake County goes on to cite some cases involving real party in interest issues in an attempt to deny conflicts with this Court's decisions. This argument is also unpersuasive. All the cases cited by Petitioner, Gibson v. Chouteau, Simmons v. Ogle, and others, involved actions by or involving the United States' grantee seeking to clear their title which was clouded by other private parties claiming to hold an interest or title which arose during the time of ownership by the United

States. This is also the situation here. In the cases cited by Salt Lake County, the United States brought suit to assert rights for the benefit of private parties long after those parties had obtained their interest from the United States. The cases were dealt with as though they were simply brought by these private parties, the real parties in interest. In United States v. Beebe, 127 U.S. 338, the facts involved private parties whose respective claims were some forty-five years old and limitations periods ran during the time they were the real parties in interest. Similarly, in Curtner v. United States, 149 U.S. 662 (1893), both parties claimed interest under the United States and the asserted periods of limitations and laches accrued entirely after the private interests had attached. Neither case has any persuasive authority to the facts of this case, where Petitioner immediately

brought suit to quiet title after acquiring title from the SBA.

II.

SALT LAKE COUNTY MISSTATES OR MISAPPREHENDS THE LAW OF UNITED STATES v. ALABAMA AS IT PERTAINS TO VOID DEEDS.

Salt Lake County asserts in its Brief that Petitioner's contention--that a deed issued from a county lacking jurisdiction over the property because of ownership in the United States is void--is not supported by legal authority, implying that such a deed is merely voidable. Petitioner strongly disagrees.

Apparently Salt Lake County believes this Court did not mean what it said in United States v. Alabama, 313 U.S. 274 (1940). In the Alabama case, this Court viewed a fact situation materially identical with this case at the time of Salt Lake County's purported 1984 tax sale. With respect to the tax sales, this Court

stated:

> A proceeding against property in which the United States has an interest is a suit against the United States. [Citation omitted] The United States was an indispensable party to proceedings for the sale of the lands, and in the absence of its consent to the prosecution of such proceedings, the county court was without jurisdiction and its decrees, the tax sales and the certificates of purchase issued to the State were void.

Alabama, at 313 U.S. 282 [emphasis added].

It is the lack of jurisdiction that renders the tax deeds void. Jurisdiction goes to the very power of the actor to assert authority over the property, just as presence or absence of jurisdiction in a court either gives it authority, or finds

authority lacking, respectively, to act on the matter before it. Courts universally recognize that a decision rendered without jurisdiction is void, not merely voidable. As this Court clearly indicated in Valley v. Northern Fire & Marine Ins. Co., 254 U.S. 348, 41 S.Ct. 116, 65 L.Ed.297 (1920):

> Courts are constituted by authority and they cannot go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments are regarded as nullities. They are not voidable, but simply void, and this even prior to reversal.

Valley, at 254 U.S. 353-54.

Just as decisions of courts in excess of their jurisdiction are void, tax sales of property over which the taxing authority lacks jurisdiction are also void, not

merely voidable. This is the holding of this Court in United States v. Alabama. The principle is also supported in Baxter v. Utah Department of Transportation, 783 P.2d 1045 (Ut.App. 1989), where the Utah Appellate Court's determination that because the property therein was not within the boundaries of the taxing county, its tax deed was void. Since that county lacked jurisdiction, it therefore "had no authority to tax the property, to acquire title when taxes were unpaid, or to convey title through a tax deed." Baxter, at 783 P.2d 1047. Just as the taxing county in Baxter lacked jurisdiction because the land was not within its boundaries, Salt Lake County lacked jurisdiction over the property herein at the time of the tax sale because it was owned by the SBA. Though the lack of jurisdiction by the taxing authorities arose through different circumstances, the result is the same: the

tax deeds were void. United States v. Alabama, 313 U.S. 274 (1940). Thus, the Utah Supreme Court's decision in Hansen v. Morris, 3 Utah 2d 310, 283 P.2d. 884 (1955), supports Petitioner's position by declaring that short statutes of limitation will run only if the tax deeds are valid on their face and executed by the same authority that could have passed good title if each and every statutory step in perfecting a tax title had been followed, without the aid of limitations statute. Hansen v. Morris, at 283 P.2d 887. Since a county that does not have jurisdiction over the property cannot pass good title no matter how closely statutory steps are followed, limitations statutes are not applicable to such circumstances as appear in this case.

III.

COUNTY'S THIRD-PARTY STANDING ARGUMENTS ARE UNSUPPORTED.

Salt Lake County asserts, without evidentiary or legal support, that Petitioner does not meet the factors permitting third-party standing. In its Brief in Opposition, the County claims that no burden will fall on the government as a result of the Utah Court's decision, nor would it impair the federal government's ability to manage and dispose of its property. It is worth noting that the SBA does not agree with this view. In a letter to the Utah Supreme Court following the decision herein, the SBA urged the Utah Court to reconsider its decision, because it would "have serious adverse impact on the SBA's future loan liquidation activities," would "strip the SBA of the value of its property rights," and would "condone and give legitimacy to the illegal

taxation and taking that occurred in this case." See, SBA letter to Utah Supreme Court, reprinted herein as Appendix A.

Both the Utah Supreme Court's decision and Salt Lake County's arguments are supported only by the Tenth Circuit's decision in Kemmerer Coal Co. v. BYU, 723 F.2d 54 (10th Cir. 1981). Petitioner believes the Kemmerer opinion is fundamentally flawed and a classic example of the adage that "bad facts make bad law." But the ultimate holding of Kemmerer is to allow the statute of limitations to run against the grantee of a private party claiming a due process violation. However, under the facts of this case and under federal law there was no period during which the limitations could run due to the SBA's ownership. The Utah Court has failed to address this distinction. The fact that Petitioner purchased the property "on notice" of the tax deed is irrelevant

in light of the fact that well-settled federal law gives "notice" that the tax deed was void and that the SBA remained the lawful owner.

It is short-sighted to assume that the door opened by the Utah Supreme Court's decision herein will go unnoticed. Having allowed the County to illegally assess federally-owned property, then confirm the tax sale which was undeniably void under the well-established law of this Court, it is not a fanciful expectation that Salt Lake County and other local governments will accept the invitation of the Utah Court to raid federal assets. Petitioner asks this Court to correct this aberrant decision of the Utah Supreme Court, and to reaffirm the federal government's authority of managing and disposing of its property and its grantee's right to receive the benefit of such disposition.

CONCLUSION

For the above reasons, along with those expressed in his Petition for Writ of Certiorari, Petitioner requests that a Writ of Certiorari issue in this case and the decision of the Utah Supreme Court be reversed.

DATED November 23, 1992.

Respectfully submitted,

ERIC P. HARTMAN
Counsel of Record for
Petitioner E.D. Shelledy

APPENDIX A

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

May 1, 1992

The Honorable Richard C. Howe
Associate Chief Justice
Utah Supreme Court
322 State Capital Building
Salt Lake City, Utah 84114

Re: Utah Supreme Court Opinion in Shelledy v. Lore, et.al., No. 900074

Dear Justice Howe:

The Utah Supreme Court's Opinion in Shelledy v. Lore, et.al., No. 900074, issued April 14, 1992, has been brought to our attention. Although the Small Business Administration ("SBA") was not made a party to the above-captioned action, most of the issues in the case involve the Agency and the decision itself will have a serious adverse impact on the SBA's future loan liquidation activities. Accordingly, we are writing to respectfully request the Court to grant the Petition for Rehearing

of Appellant E. D. Shelledy in order to reconsider the ruling. We believe the current ruling will not only have a serious adverse impact upon the rights of the SBA as previously stated, but will set disturbing, and we believe incorrect, precedent contrary to established doctrines of sovereign immunity and the federal/state relationship.

As the decision notes, following the preliminary tax sale on January 15, 1979, the property owner, although delinquent in his real estate taxes, maintained the underlying ownership interest in the property. Thus, the quitclaim deed from the Pearsons to the SBA in 1981 vested in the SBA fee simple title to the property.

The SBA, as an agency of the Federal Government, is entitled to its sovereign immunity. Salt Lake County ("County") was, thus, barred from enforcing any tax liens against the United States unless the United

States waived its sovereign immunity to such suit. In 1972, the United States Congress passed the Quiet Title Act, 28 U.S.C. § 2409a, providing a limited waiver of sovereign immunity to persons challenging the United States' title to real property. Under the Quiet Title Act, Congress provided the exclusive means by which an adverse claimant can challenge the United States' title to real property. As the United States Supreme Court stated, the Quiet Title Act provides "the exclusive means by which adverse claimants could challenge the United States' title to real property." Block v. North Dakota, 461 U.S. 273, 286, 75 L.Ed. 2d 840, 103 S.Ct. 1811 (1983) (emphasis added).

Thus, under the federal statutory scheme and United States Supreme Court precedent, the only way the County could obtain title to property held in the name of a United States instrumentality is by

suit in federal court pursuant to 28 U.S.C. § 2409a. Consequently, during the time the SBA held title to the property, the County could not wrest title from the SBA by a non-judicial tax sale. In the instant case, the County was obligated to bring a suit against the United States under the Quiet Title Act in order to obtain legal title to the property. It did not do so. Without such action, the County could not and did not obtain valid legal title to the property in the May 1984 tax sale. Furthermore, the County could not validly transfer what it did not have. Title to the property remained with the SBA until the SBA transferred its interest in the property to Mr. Shelledy in 1988.

In addition, the Shelledy decision allows the Utah four year statute of limitations to run against the United States. This holding clearly contravenes

well-established United States Supreme Court precedent that the United States and its instrumentalities are not subject to state statutes of limitations. United States v. Summerlin, 310 U.S. 414, 84 L.Ed. 1283 (1940); United States v. John Hancock Mutual Life Insurance Co., 364 U.S. 301, 5 L.Ed. 2d 1 (1960). Because the Utah statute of limitations could not run against the SBA while SBA owned the property, the SBA retained legal title to the property which it then transferred to Mr. Shelledy. Thus, the effect of the Court's decision is to strip the SBA of the value of its property rights by stating that the time for asserting a claim against a tax sale ran as to Mr. Shelledy -- indeed as to all potential purchasers of the property -- before he acquired the property from the SBA.

The Shelledy decision recognizes that property owned by the SBA is exempt from

taxation. This is in harmony with the United States Supreme Court's holding in M'Culloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819). Nevertheless, the effect of the Shelledy decision is to condone and give legitimacy to the illegal taxation and taking that occurred in this case. The tax sale held by the County in May of 1984 included illegal taxes levied by the County against the SBA. The Utah Supreme Court has previously held that "if the tax on the land for which the [tax] sale was made is invalid, then the sale is void, and the defendant got no title by her tax deed." Huntington City v. Peterson, 518 P.2d 1246, 1249 (Utah Supreme Court 1974). Here, where the tax sale was based at least in part upon illegally levied taxes, the tax sale, under Utah precedent, should likewise be held void, and the County found not to have obtained valid title by the tax deed.

Finally, the Shelledy decision states that Mr. Shelledy cannot assert the constitutional rights of the SBA, because there is no substantial relationship between the parties. This would seem to ignore the seller/buyer relationship between the SBA and Mr. Shelledy. Moreover, the decision states that Mr. Shelledy cannot assert the constitutional rights of the SBA because the SBA will not be adversely affected. With this we cannot agree.

As outlined above, the SBA believes that the precedent set by the Shelledy decision will adversely affect the SBA's interests. Accordingly, the SBA respectfully urges the Court to grant the Appellant's Petition for a Rehearing and to reconsider its decision in this case. If the Court determines to grant the Petition for Rehearing, the SBA will seek the Court's approval to participate.

Respectfully,

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